

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)
)
Black Hills Fiber Systems, Inc.)
)
Petition for Special Relief Requesting a Finding)
Of Effective Competition in Various South)
Dakota Communities)

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 2003

Released: May 30, 2003

By the Deputy Chief, Policy Division, Media Bureau:

1. Black Hills Fiber Systems, Inc. ("Black Hills") filed a Petition for Special Relief¹ requesting a finding of effective competition in various South Dakota communities (the "Communities")² in conjunction with its showing of compliance with Section 21.912 of the Commission's rules.³ Black Hills' petition is unopposed.

2. The Communications Act and the Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated.⁴ One of the bases by which a cable system will be deemed subject to effective competition is where a franchise area is: (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁵ In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist

¹See 47 C.F.R. § 76.7; Application of Antilles Wireless, L.L.C. to Transfer Control of MMDS Station Licenses to Black Hills Fiber Systems, Inc.

²The Communities are: Rapid City, Piedmont, Lead, Black Hawk, Sturgis and Deadwood, South Dakota.

³47 C.F.R. § 21.912. Petitioners must file for special relief pursuant to Section 76.7 when demonstrating compliance with Section 21.912 based on the effective competition exception to Section 21.912. See *Letter dated January 21, 1998 from Roy J. Stewart, Chief, Mass Media Bureau to Charles G. Cline, Kenneth W. Garrard, BellSouth Wireless Cable, Inc. and BellSouth Corporation* (File Nos. 50849-CM-AL(1)-97 and 50851-CM-AL(2)-97).

⁴47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a).

⁵47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.906(b)(2).

⁶47 C.F.R. § 76.906.

with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.⁷ Black Hills has met this burden.

3. Black Hills has submitted reliable evidence demonstrating that the Communities are served by at least two unaffiliated multichannel video programming distributors ("MVPDs") offering comparable service to more than 50 percent of the households therein. Black Hills asserts that the service of direct broadcast satellite providers satisfy this requirement.⁸ In addition Black Hills asserts that its own facilities serving the Communities pass nearly 100 percent of the households therein.⁹ We therefore find that Black Hills has submitted sufficient evidence to satisfy the first prong of the competing provider test.

4. Black Hills has also submitted sufficient evidence demonstrating that the number of households subscribing to MVPDs other than the largest MVPD exceeds 15 percent of the households in the Communities. Relying on its own subscribership information, Black Hills submits evidence that the aggregate subscribership to MVPDs other than the largest MVPD in the Communities exceeds 15 percent of the households.¹⁰ We find that Black Hills has submitted sufficient evidence to satisfy the second prong of the competing provider test, thereby establishing the presence of effective competition in the Communities.

5. Accordingly, **IT IS ORDERED** that the petition for special relief requesting a finding of effective competition in the Communities filed by Black Hills Fiber Systems, Inc. **IS GRANTED**.

6. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

⁷47 C.F.R. § 76.911(b)(1).

⁸Petition at 2. See *Time Warner Entertainment – Advance/Newhouse Partnership d/b/a Time Warner Communications*, 15 FCC Rcd 8852, 8854 (CSB 2000); *Jones Intercable, Inc.*, 15 FCC Rcd 7257, 7258 (CSB 2000).

⁹Petition at Exhibit C-B.

¹⁰*Id.* at 2. Black Hills asserts that the incumbent cable operator is the largest MVPD in each of the Communities. The precise penetration rate for each community is set forth on Attachment A.

¹¹47 C.F.R. § 0.283.

Attachment A**Percentage of Households in the Communities
Subscribing to MVPDs Other than the Largest MVPD**

<u>Community</u>	<u>Black Hills % of Households</u>
1. Rapid City	41%
2. Piedmont	34%
3. Lead	49%
4. Black Hawk	44%
5. Sturgis	41%
6. Deadwood	49%